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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

SAUSALITO PHARMACY, INC.,
Petitioner,

VS.

BLUE SHIELD OF CALIFORNIA, TRAVELERS INSURANCE CO., METROPOLITAN LIFE INSURANCE CO., d/b/a MEDIMET, AETNA LIFE INSURANCE CO., HEALTH SYSTEMS INSTITUTE, PAID PRESCRIPTIONS INC., a Nevada Corporation, PAID PRESCRIPTIONS INC., a New Jersey Corporation, PHARMACEUTICAL CARD SYSTEMS, PRE-PAID PRESCRIPTION PLANS, INC. and U.S. ADMINISTRATORS, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

I.

This case presents the issue which the Supreme Court reserved in *Group Life & Health Insurance Co. v. Royal Drug Co.* and *Arizona v. Maricopa County Medical Society:* Does the Sherman Act permit an insurer to fix prescription drug prices that independent pharmacies may charge their insured customers?

> "Whether the [participating pharmacy] Agreements are *illegal* under the antitrust laws is an entirely separate question, not now before us." *Group Life and Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 210 (1979).
>
> "Nor does this case present the question whether an insurer may, consistent with the Sherman Act, fix the fee schedule and enter into bilateral contracts with individual doctors. That question was not reached in *Group Life & Health Insurance Co. v. Royal Drug Co. . . .*" *Arizona v. Maricopa County Medical Society*, ... U.S. ....., 102 S. Ct. 2466, 2478 n.26 (1982).

II.

Should this Court explain one sentence in *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 214 (1979), which has been interpreted in summary judgment proceedings to permit antitrust violations by insurance companies and insurance plan administrators who fix the prices participating pharmacies may charge their customers for prescription drugs?

III.

Did the court of appeals err in refusing to consider this Court's opinion in *Arizona v. Maricopa County Medical Society*, ... U.S. ....., 102 S. Ct. 2466 (1982), which reversed the Ninth Circuit decision relied upon by the district court below?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Sausalito Pharmacy, Inc. respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered on May 10, 1982.

OPINIONS BELOW

The May 12, 1980 memorandum and order of the district court denying Sausalito Pharmacy's and defendant Blue

Shield's cross motions for summary judgment is reported in [1980-81] Trade Cas. (CCH) ¶ 63,695 (N.D. Cal. 1980) and is reprinted as Appendix A to this Petition. The March 16, 1981 memorandum and order of the district court granting defendants' motion for summary judgment is reported in [1981-1] Trade Cas. (CCH) ¶ 63,885 (N.D. Cal. 1981) and is reprinted as Appendix B to this Petition. The *per curiam* opinion of the court of appeals dated May 10, 1982, affirming the district court's March 16, 1981 order, has been published at 677 F.2d 47 (9th Cir. 1982), and that opinion is reprinted as Appendix C to this Petition. The court of appeals' Order of June 21, 1982 denying Sausalito Pharmacy's petition for rehearing is reprinted as Appendix E to this Petition.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on May 10, 1982. Sausalito Pharmacy's petition for rehearing was timely filed on May 24, 1982. That petition was denied on June 21, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

STATEMENT OF THE CASE

Sausalito Pharmacy, Inc., together with several other independent retail pharmacies located in California,[1] brought this action against Blue Shield of California and nine other insurers or insurance plan administrators, alleging price fixing in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The pre-paid prescription drug plans challenged in this case are similar to those involved in *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205 (1979). *See* Memorandum and Order of May 12, 1980, Appendix A at 4. The terms of the participating pharmacy agreements offered on a take-it-or-leave-it basis to pharmacies by respondents may differ from each other in minor respects, but all provide that the pharmacy may not charge the insured customer any more than the deductible, or "co-pay" (if any), provided for by the terms of the insurer's contract with its insureds. The insurer or plan administrator agrees to reimburse the pharmacy for the cost of the drug plus a dispensing or "professional" fee, less the deductible or co-payment. The insurance company determines the cost of the drug according to average wholesale prices, while the dispensing or professional fee is fixed unilaterally by the insurer. *See* Memorandum and Order of May 12, 1982, Appendix A at 2. The total amount of reimbursement set by the insurers is generally less than the amounts the pharmacies receive for the same drugs and services from their non-insured customers. Complaint, ¶ 15 at pp. 7-8, CR 7-8. All plans here at issue prohibit the participating pharmacy from "balance billing," or col-

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[1]All pharmacies except Sausalito Pharmacy sought voluntary dismissals of their appeal to the Ninth Circuit, leaving Sausalito Pharmacy as the sole remaining appellant.

lecting more from the customer than the amounts set in the participating pharmacy agreements. Appendix A at 2.[2]

PROCEEDINGS BELOW

The District Court

A. Plaintiffs' Motion For Partial Summary Judgment

Plaintiff pharmacies moved for partial summary judgment[3] on the ground that the defendants' participating pharmacy agreements were price-fixing contracts, and as such were *per se* illegal under Section 1 of the Sherman Act.

The district court denied this motion on May 12, 1980, relying on certain language in this Court's opinion in *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205, 214 (1979). In that opinion, the Court stated that the participating pharmacy agreements there at issue were not the "business of insurance," but rather were "arrangements for the purchase of goods and services" by the

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[2]Beneficiaries of these plans may purchase drugs from a non-participating pharmacy, paying the pharmacist's usual and customary price, but in such cases, the beneficiary is only reimbursed for 75 percent of the "reasonable" costs of the drug, as determined by the insurance company. Appendix A at 2.

As the Fifth Circuit recognized in *Royal Drug Co. v. Group Life & Health Insurance Co.*, 556 F.2d 1375, 1383-84 (5th Cir. 1977), *aff'd on other grounds*, 440 U.S. 205 (1979) and *Battle v. Liberty National Life Insurance Co.*, 493 F.2d 39, 44-45 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975), by providing substantially decreased benefits to subscribers who patronize non-participating pharmacies, the insurance companies are intentionally and overtly coercing their subscribers to boycott non-participating pharmacies. *See* page 15, *infra*.

[3]Blue Shield's cross motion for summary judgment, brought under the "state action" exemption of *Parker v. Brown*, 317 U.S. 341 (1943), was denied by the district court.

insurer. 440 U.S. at 214. The district court assumed from this language that the insurer was the purchaser, the pharmacy was the seller, and that no "third party" was involved at all. Without a sale to a third party, the district court reasoned, there could be no *per se* price-fixing violation. Appendix A at 5.

The district court relied on the Ninth Circuit's opinion in *Arizona v. Maricopa County Medical Society*, 643 F.2d 553 (9th Cir. 1980), rev'd ..... U.S. ....., 102 S. Ct. 2466 (1982). In that decision, subsequently overturned by this Court, the Ninth Circuit erroneously declined to apply the *per se* rule to the physicians' price-fixing arrangement there under consideration. The district court followed the Ninth Circuit's decision in *Maricopa County*, refusing to analyze the participating pharmacy agreements here at issue under the *per se* standard. Appendix A at 6-7.

B. Defendants' Motion For Summary Judgment

Thereafter, the defendants moved for summary judgment, claiming that the price-fixing provisions of their participating pharmacy agreements were "*per se* legal." Plaintiffs renewed their contention that the pharmacies' insured customers, rather than the insurance companies, were the true "purchasers" of the drugs, and were thus the third parties necessary to a finding of *per se* price-fixing. The district court, however, reiterated its reliance on the "arrangements for the purchase of goods and services" language of *Royal Drug, supra*, 440 U.S. at 214, holding that as the contracts did "not set prices to be charged third parties, the issue to be decided is whether these agreements are *unreasonable* vertical restraints of trade." Appendix B

at 16-17. The district court analyzed the evidence before it under the rule of reason, and concluded that there was no antitrust violation. The court also concluded that there was insufficient evidence of horizontal conspiracy, and entered summary judgment for defendants. Appendix B at 35-36.

The Court of Appeals

In its opening brief, Sausalito Pharmacy invited the Ninth Circuit's attention to the Supreme Court's grant of certiorari in *Arizona v. Maricopa County Medical Society*, 450 U.S. 979 (1981), and pointed out that a reversal of the Ninth Circuit's decision in that case would alter the legal standard governing the instant case. Opening brief for appellant at 23 and footnote. The same point was raised on oral argument before the Ninth Circuit, and counsel for Sausalito Pharmacy requested that the Ninth Circuit wait for the Supreme Court's decision in *Maricopa County* before deciding this case. The Ninth Circuit, however, issued a *per curiam* opinion on May 10, 1982 (six weeks before the Court's decision in *Maricopa County*) affirming the district court's award of summary judgment to defendants. That opinion did not cite to or mention the *Maricopa County* case. 677 F.2d 47 (9th Cir. 1982). Appendix C.

Sausalito Pharmacy filed a timely petition for rehearing, again urging that a decision in this case rendered before the Supreme Court had spoken in *Maricopa County* was premature. Three days after this Court's decision in *Maricopa County* was announced, ... U.S. ....., 102 S. Ct. 2466 (1982), the Ninth Circuit denied Sausalito Pharmacy's petition for rehearing, again without any mention of the Supreme Court's opinion in *Maricopa County*. Appendix D.

REASONS FOR GRANTING THE WRIT

I. Sausalito Pharmacy Is the Third Case In Recent Years Involving the Question Whether Private Health Care Contracts Can Supercede the Antitrust Laws. This Court Must Resolve Issues of Profound National Importance Reserved in Royal Drug and Maricopa County, and Now Ripe for Review.

Following the landmark decision in *Goldberg v. Virginia State Bar*, 421 U.S. 773 (1975), which held that a bar association fee schedule was a *per se* violation of the antitrust laws, and *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), which held that a professional society's self regulation would be analyzed, for antitrust purposes, according to whether its policies promoted or suppressed competition, this Court has been called upon to resolve important antitrust issues in other "learned professions," including the health care industry. Two recent cases, *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205 (1979), (*"Royal Drug"*) and *Arizona v. Maricopa County Medical Society*, ... U.S. ....., 102 S. Ct. 2466 (1982), (*"Maricopa County"*) have brought to this Court's attention a potential clash between the health care industry and the antitrust laws.

In *Royal Drug*, this Court held that price-fixing agreements similar to those presented in the instant case could not escape antitrust scrutiny under the "business of insurance" exemption of the McCarran-Ferguson Act. Next, in *Maricopa County*, this Court found a maximum fee agreement among doctors to be a *per se* violation of the antitrust laws. Now, Sausalito Pharmacy asks this Court to direct its attention to a case questioning the legality of

the same type of provider contract challenged in *Royal Drug*, and one involving maximum professional fee schedules similar to those invalidated in *Maricopa County*. This case presents an important question of antitrust law that has not yet been, but that sooner or later must be, settled by this Court.

In *Royal Drug*, this Court specifically recognized that it would one day have to decide on the merits whether the pharmacy agreements under discussion in that case (and here) violated the Sherman Act. 440 U.S. at 210. Because the *Royal Drug* case turned solely on the issue of whether the pharmacy agreements fell within the "business of insurance" exemption of the McCarran-Ferguson Act, this Court did not decide the underlying antitrust question, leaving its resolution to another day: "Whether the Agreements are *illegal* under the antitrust laws is an entirely separate question, not now before us." *Id.*

Similarly, in *Maricopa County*, 102 S. Ct. at 2478 n.26, this Court recognized, but was not required to reach, "the question whether any insurer may, consistent with the Sherman Act, fix the fee schedule and enter into bilateral contracts with individual doctors." The *Sausalito Pharmacy* case now presents that issue: whether the Sherman Act permits an insurer to fix the prices that an independent pharmacy may charge its customers.

This Court has already noted the importance of the antitrust question raised in this case, while at the same time recognizing that neither *Royal Drug* nor *Maricopa County* required a resolution of that underlying issue. This case now requires such a resolution. Without guidance from this nation's highest Court, the health care industry

will continue to be uncertain as to whether some of its attempts to regulate prices can survive antitrust scrutiny. Health care providers will not know whether they are entitled to relief from certain oppressive and anticompetitive practices of the insurance companies. Given the national interest in a final resolution of these issues, Sausalito Pharmacy's petition for certiorari must be granted.

II. The District Court and the Court of Appeals Erred In Interpreting Group Life & Health Insurance Co. v. Royal Drug Co., 440 U.S. 205, 214 (1979) as Precluding Them from Finding That Respondents Illegally Fixed the Prices That Participating Pharmacies May Charge Their Insured Customers For Prescription Drugs.

Despite the care taken by this Court to state its holding in *Royal Drug* in narrow terms,[4] that opinion has been read by the district court, in summary judgment proceedings in this case, as compelling a finding that the pharmacy agreements could not, *per se*, constitute price fixing. The district court relied on language in the *Royal Drug* case, 440 U.S. at 214, describing the pharmacy agreements there under consideration as "arrangements for the purchase of goods and services" to hold that the insurer was the purchaser of the prescription drugs. Thus, the district court reasoned, there was no sale to a third party, and therefore, there could be no illegal price-fixing. Appendix B at 15-16.

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[4] "The only issue before us is whether the Court of Appeals was correct in concluding that these Pharmacy Agreements are not the 'business of insurance' within the meaning of § 2(b) of the McCarran-Ferguson Act. If that conclusion is correct, then the Agreements are not exempt from examination under the antitrust laws. Whether the Agreements are *illegal* under the antitrust laws is an entirely separate question, not now before us." 440 U.S. at 210 (footnotes omitted).

In its initial opinion in this case, the district court stated:

> Accepting, as we must, the Supreme Court's view that the insurer is the purchaser in these agreements, it is plain that the agreements are not *per se* violative of the antitrust laws. Virtually every contract for the sale of goods "fixes" the "price" at which the goods are to be sold. This is "price-fixing" only in the most trivial sense of the term. Not every agreement which literally fixes a price gives rise to *per se* liability under the antitrust laws.

Appendix A at 5. In its final opinion, the district court reaffirmed this interpretation of *Royal Drug*. *See* Appendix B at 15. The Ninth Circuit, in a terse *per curiam* opinion, affirmed. *Sausalito Pharmacy, Inc. v. Blue Shield of California*, 677 F.2d 47 (9th Cir. 1982), Appendix C.

While the district court's approach relies on the literal language of the *Royal Drug* opinion, it cannot accurately reflect the Supreme Court's intent in that case. By labelling the insurer as the "purchaser" of the drugs, the district court has cut short any meaningful analysis of the price-fixing problem presented in the instant case, and in doing so, the district court has ignored this Court's express acknowledgment that the issue must one day be decided *on the merits*. *See Royal Drug*, 440 U.S. 205, 210 *quoted in note 4, supra.*

In resolving a complex antitrust question on summary judgment by the simple expedient of labelling the insurance company the "purchaser" of the drugs, the district court (and the Ninth Circuit, which affirmed it) have fallen into the same error committed by the Ninth Circuit in *Simpson v. Union Oil Co. of California*, 377 U.S. 13 (1964). In that

case, an oil company entered into "consignment" agreements with its retailers in order to maintain resale prices. The company claimed that it was not liable for price fixing because "title" never passed to the retailer. The Supreme Court saw through this sham, and declared the scheme illegal under the antitrust laws. *See*, in addition, *U.S. v. Masonite Corp.*, 316 U.S. 265, 276-77 (1942) (labelling price fixing scheme "del credere" agency agreement does not prevent it from running afoul of the Sherman Act); *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346, 354 (1922) (antitrust violation found where contract denominated "agency" was really one of sale); *Straus v. Victor Talking Machine Co.*, 243 U.S. 490, 501 (1917) ("use license" was actually a thinly-disguised scheme to fix prices.)

A. The Second Circuit's Analysis of the Issue Differs from that of the Ninth Circuit.

The proper interpretation to be accorded the purchase/sale language of *Royal Drug* has troubled the Second Circuit, as well as the Ninth. In *Medical Arts Pharmacy of Stamford, Inc. v. Blue Cross & Blue Shield of Connecticut, Inc.*, 675 F.2d 502 (2d Cir. 1982)[*] (a case decided *before* this Court's decision in *Maricopa County* holding health care providers liable for *per se* price fixing), the Second Circuit affirmed the lower court's ruling that the participating pharmacy agreements there in question did not constitute a *per se* violation of Section 1 of the Sherman Act.

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[*]The Ninth Circuit cited this opinion in the instant case, but apparently did not rely on its analysis.

The district court in *Medical Arts* had relied heavily on the lower court's opinion in the instant case, agreeing with its interpretation of the purchase and sale language in *Royal Drug. Medical Arts Pharmacy of Stamford, Inc. v. Blue Cross & Blue Shield of Connecticut, Inc.*, 518 F. Supp. 1100, 1105 (D. Conn. 1981). The district court also agreed with Judge Sneed's analysis in *Arizona v. Maricopa County Medical Society*, 643 F.2d 553, 556 (9th Cir. 1980), *rev'd*, ... U.S. ....., 102 S. Ct. 2466 (1982), finding that the health care industry required special consideration in Sherman Act cases.*

The Second Circuit, while affirming the district court, took a different view of the problem. Although the district court specifically found that the defendant insurance companies were the "purchasers," 518 F. Supp. at 1109, citing *Royal Drug*, the Second Circuit disagreed, holding that the pharmacy agreements were *"sui generis."* The Second Circuit described the agreements as fixing prices "not precisely between seller and purchaser (but between seller and indemnitor) . . . ." *Medical Arts Pharmacy of Stamford, Inc. v. Blue Cross & Blue Shield of Connecticut, Inc.*, 675 F.2d at 506.

The Second Circuit was careful to note that Medical Arts Pharmacy (unlike the petitioner presently before this Court) had " 'placed all [its] eggs in the *per se* basket.' " *Id.* The Second Circuit criticized the appellant for failing to allege that "the prices Blue Cross pays to participating

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*The district court in *Medical Arts* recognized, however, that the Supreme Court's grant of certiorari in the *Maricopa County* case might resolve the issue of whether such agreements should be analyzed as *per se* violations, or under the rule of reason. 518 F. Supp. at 1106 n.8. Thus, the Supreme Court's decision in *Maricopa County* adversely affects the continued validity of the *Medical Arts* opinions, as well as the decisions in *Sausalito Pharmacy*.

pharmacies in any way affect the prices those pharmacies charge for prescription drugs provided to non-Blue Cross customers. . . ." *Id.* at 507. The Second Circuit also pointed out that no evidence had been presented in support of appellant's claims of horizontal conspiracy. *Id.* at 506-07. The Second Circuit's opinion thus implies that, if such claims had been made, a different result might have been achieved in that case.

Such claims were made in the instant case.[7] In addition, appellants presented uncontroverted evidence in the form of pharmacist affidavits that

> [t]he diminished profitability resulting from sales to persons covered by defendants' plans requires that [the pharmacist's] usual and customary fee to the cash and carry public for any given prescription be made higher to compensate for that loss of profit. . . . [This] results in the cash and carry public having to subsidize the artifically low prescription prices fixed by defendants for transactions between the pharmacist and the patient covered by defendants' plan.

E.g., Affidavit of Martin Schurr, CR 900-01.

Thus, had the Second Circuit reviewed the *Sausalito Pharmacy* case under the standards it applied in *Medical Arts*, the opposite result could have been achieved.

B. The Fifth Circuit Has Criticized the Pharmacy Agreements Upheld by the Ninth Circuit.

The Fifth Circuit, in contrast with the Ninth Circuit, has sharply criticized the price-fixing practices of Blue Shield

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[7] The evidence supporting the allegations of horizontal conspiracy is described in appellant's briefs to the Ninth Circuit, and need not be reargued here.

in its contracts with participating pharmacies. In *Royal Drug Co. v. Group Life & Health Insurance Co.*, 556 F.2d 1375 (5th Cir. 1977), *aff'd on other grounds*, 440 U.S. 205 (1979), the Fifth Circuit grumbled:

> *we find that the agreements between Blue Shield and Participating Pharmacies do not require Blue Shield to fix prices or to produce other anticompetitive effects in the pharmaceutical industry.* Blue Shield's sole obligation is to see that the insured receives prescription drugs and "shall be required to pay no more than the drug deductible for each of such covered drugs." *It is unnecessary for Blue Shield to agree with pharmacies to fix retail sales prices in the pharmaceutical industry.* Blue Shield's policyholders are basically unconcerned with the contract between the insurer and the Participating Pharmacy. They are obligated to pay a Participating Pharmacy two dollars ($2.00) for a prescription regardless of the presence or absence of a price fixing arrangement. Thus, *by minimizing costs and maximizing profits, the Participating Pharmacy Agreements inure principally to the benefit of Blue Shield.*

556 F.2d at 1381 (emphasis added).

The Fifth Circuit compared the participating pharmacy agreements with the burial policies involved in *Battle v. Liberty National Life Insurance Co.*, 493 F.2d 39 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975). In the burial policies, as in the pharmacy agreements at issue in *Royal Drug* and here, the insurance contract conferred far more benefits on policy holders using participating funeral homes than on those who chose the services of a funeral home not participating in the plan. The Fifth Circuit in *Battle* found

coercion with respect to the discrimination in benefits, and the Fifth Circuit applied the same analysis in *Royal Drug:*

> Relying on *Battle,* the plaintiffs argue that the defendants' activities challenged herein are not peculiar to the insurance industry and are not the business of insurance. They argue that by providing markedly decreased benefits to those subscribers who patronize a nonparticipating pharmacy, Blue Shield intentionally and overtly coerces its subscribers to boycott these pharmacies. Not only does this boycott operate to coerce the nonsigning pharmacies to participate in the plan, it also forecloses nonsigning pharmacies from a significant portion of the market and secures for participating pharmacies the sale of prescription drugs required by Blue Shield's claimants. Since this activity is not peculiar to the insurance industry, plaintiffs argue that it does not constitute the business of insurance. As in *Battle,* the contractual agreements here under review are somewhat related to the business of insurance. The relationship, however, is so attenuated that it must be subject to the antitrust laws. As the plaintiffs have so well articulated, "it is not the office of the insurance industry to set the prices in the various sectors of our economy so that insurers will enjoy an added measure of control over the magnitude of individual claims."

556 F.2d at 1383-84.

The conflicting approaches adopted by the Ninth, Second and Fifth Circuits signal a need for this Court to settle the issue by resolving the substantive question reserved in *Royal Drug.* Whether the insurance company is a "purchaser", an "indemnitor", or some other species of animal, the central question remains unresolved: whether the antitrust laws permit insurance companies to fix prescription drug prices that independent pharmacies may charge their

insured customers. That question is now ripe for decision by this Court.

III. The Ninth Circuit Erred in Refusing to Wait for and to Apply This Court's Decision in Maricopa County to the Instant Case.

Sausalito Pharmacy's Petition for Rehearing was denied by the Ninth Circuit on June 21, 1982, three days after this Court's decision overruling the Ninth Circuit in *Arizona v. Maricopa County Medical Society*, ... U.S. ....., 102 S. Ct. 2466 (1982). Sausalito Pharmacy had petitioned for rehearing on the ground that the Ninth Circuit had apparently overlooked the impact of this Court's grant of certiorari in *Maricopa County*, despite mention of its importance in Sausalito Pharmacy's opening brief and at oral argument. As Sausalito Pharmacy's Petition for Rehearing, Appendix D at 40-42, pointed out, the relevance of the Supreme Court's decision overruling the Ninth Circuit in *Maricopa County* is direct and immediate, because the district court in the instant case had relied upon that decision in holding that the *per se* standard could not be applied. The district court's reliance on the Ninth Circuit's erroneous refusal to apply a *per se* standard in *Maricopa County* was expressed in its first opinion denying plaintiffs' motion for summary judgment, Appendix A at 6, and implied in its grant of summary judgment to defendants the next year. Appendix B.

Had the Ninth Circuit analyzed this Court's *Maricopa County* opinion, it would have recognized its relevance to the instant case. In overruling the Ninth Circuit in *Maricopa County*, this Court held that a *per se* violation occurred where a ceiling on doctors' fee tended

> to provide the same economic rewards to all practitioners regardless of their skill, their experience, their

> training, or their willingness to employ innovative and difficult procedures in individual cases. Such a restraint also may discourage entry into the market and may deter experimentation and new developments by individual entrepreneurs. It may be a masquerade for an agreement to fix uniform prices, or it may in the future take on that character.
>
> ..... U.S. ....., 102 S. Ct. at 2475.

The pharmacy agreements in the instant case have the same pernicious effect. They provide the same economic rewards (or lack thereof) to all pharmacists, regardless of their skill, experience, training, or willingness to provide extra services such as patient profiles, counseling on drug interactions, delivery services, and the like. The price restraints in the participating pharmacy agreements may also discourage entry into the market, as well as deterring experimentation with enhanced levels of services and other forms of non-price competition by individual entrepreneurs. And like the doctors' fees fixed in *Maricopa County*, the drug reimbursement and dispensing fees set in the pharmacy agreements surely will, to the extent they have not already done so, fix prices at a uniform level.

In *Maricopa County*, this Court also gave short shrift to the Ninth Circuit's position that the judiciary's relative lack of experience in the health care field should prevent application of the *per se* rule, an erroneous conclusion relied upon in the instant case by the district court. Appendix A at 6-7.[8] In its *Maricopa County* decision, this Court stated:

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[8] "Our conclusion that the participating pharmacy agreements are not *per se* unlawful is fortified by the recent decision of the Ninth Circuit in *State of Arizona v. Maricopa County Medical Society*. . . .

We are equally unpersuaded by the argument that we should not apply the *per se* rule in this case because the judiciary has little antitrust experience in the health care industry. The argument quite obviously is inconsistent with *Socony-Vacuum*. In unequivocal terms, we stated that, "[w]hatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike." 310 U.S., at 222. We also stated that "[t]he elimination of so-called competitive evils [in an industry] is no legal justification" for price fixing agreements, *id.*, at 220, yet the Court of Appeals refused to apply the *per se* rule in this case in part because the health care industry was so far removed from the competitive model. Consistent with our prediction in *Socony-Vacuum*, *id.*, at 221, the result of this reasoning was the adoption by the Court of Appeals of a legal standard based on the reasonableness of the fixed prices, an inquiry we have so often condemned. Finally, the argument that the *per se* rule must be rejustified for every industry that has not been subject to significant antitrust litigation ignores the rationale for *per se* rules, which in part is to avoid "the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable —an inquiry so often wholly fruitless when undertaken." *Northern Pac. R. Co. v. United States*, . . . 356 U.S. [1], at 5 [(1958)]. . . .

In upholding the District Court's denial of the State's motion for summary judgment, the Ninth Circuit observed:

> In truth, we know very little about the impact of this and many other arrangements within the health care industry. This alone should make us reluctant to invoke a *per se* rule with respect to the challenged arrangement."

Appendix A at 6-7.

..... U.S. ....., 102 S. Ct. at 2476-77. (footnotes omitted). Thus this Court's decision in *Maricopa County* has removed one of the principal grounds on which the district court's decision in the instant case rests.

The Ninth Circuit continues to misunderstand and to misapply the *per se* concept. In *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964) the Supreme Court reversed a Ninth Circuit decision that had upheld an award of partial summary judgment to the defendant oil company.[9] The Ninth Circuit's refusal to apply the *per se* standard in *Catalano, Inc. v. Target Sales, Inc.*, 605 F.2d 1097 (9th Cir. 1979), led to a unanimous *per curiam* reversal, 466 U.S. 643 (1980). *Maricopa County*, although a more difficult decision for the Court, overruled the Ninth Circuit and reaffirmed the continued viability of the *per se* rule. In the instant case, this Court must once again exercise its supervisory power over the Ninth Circuit by granting this petition for certiorari.[10]

CONCLUSION

This case squarely presents a question of national importance recognized, but not decided, by this Court in *Royal Drug* and *Maricopa County:* whether the Sherman Act permits insurance companies to fix the prices that pharmacists may charge their insured customers. In resolving this issue, the Court must decide whether the District Court for the Northern District of California (and the Ninth Circuit,

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[9]In *Simpson*, Mr. Justice Douglas was clearly applying a *per se* standard, even if he did not expressly label it as such.

[10]Given the Ninth Circuit's curious refusal to consider this Court's opinion in *Maricopa County*, the Court may wish to grant certiorari and immediately remand the case to the Ninth Circuit with instructions to analyze the case under the standards set forth in *Maricopa County*.

which affirmed that decision) failed to correctly interpret the Supreme Court's purchase/sale language in *Royal Drug*, 440 U.S. at 214. This Court must exercise its power of supervision over the Ninth Circuit, which for the third time in three years[11] has erroneously refused to apply the *per se* standard to a price-fixing case.

Therefore, petitioner respectfully prays that this petition for certiorari be granted or, in the alternative, that the petition be granted and the case immediately remanded to the Ninth Circuit for proceedings not inconsistent with this Court's opinion in *Maricopa County*.

September 13, 1982

Respectfully submitted,

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(Appendices follow)

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[11] *Catalano, Inc. v. Target Sales, Inc.*, 605 F.2d 1097 (9th Cir. 1979), *rev'd per curiam*, 446 U.S. 643 (1980); *Arizona v. Maricopa County Medical Society*, 643 F.2d 553 (9th Cir. 1980), *rev'd*, ... U.S. ..., 102 S. Ct. 2466 (1982); *see also Simpson v. Union Oil Co.*, 311 F.2d 764 (9th Cir. 1963), *rev'd*, 377 U.S. 13 (1964).